No. 12727.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

California State Board of Equalization,

Appellant,

vs.

George T. Goggin, Trustee in Bankruptcy of the Estate of West Coast Cabinet Works, Inc.,

Appellee.

APPELLEE'S BRIEF.

Leslie S. Bowden,
448 South Hill Street,
Los Angeles 13, California,
Attorney for George T. Goggin, Trustee in Bankruptcy of the Estate of West Coast Cabinet Works, Inc., Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Preliminary Statement.

Appellant has quoted a stipulation entered into before the Referee to the effect that Appellee "was engaged in the sale of tangible personal property at retail" in this State during the period March 12, 1946, to May 1, 1946, inclusive. Counsel seek to make much of this stipulation, when in truth and in fact it established nothing more than that the trustee, during such period, did make some retail sales. The court will note that the stipulation does not include the words "while conducting the business," and it was never so intended. The interpretation placed upon this stipulation by counsel for the Appellant is to the effect that such words were included, and consequently creates a furore with which counsel for Appellant so viciously attack the opinion of the District Court. We venture to state that without this false premise laid down by Appellant's counsel, much material would have to be eliminated from their opening brief.

ARGUMENT.

At the outset it should be noted that the court found from the evidence that Appellee as trustee conducted the business of the bankrupt from March 12, 1946, to March 22, 1946. On March 29, 1946, the trustee sold at public auction in open court, and subject to confirmation of court, five trucks which had been used by the bankrupt for deliveries in the conduct of its business. After adjudication an order was made to sell in liquidation. The making of said order marked the termination of Appellee's authority to conduct the business as well as the termination of the business. This is the line of cleavage between conducting the business and liquidating it. A trustee cannot then be considered as "conducting the business of the bankrupt" within the meaning of Section 2(5) of the Bankruptcy Act, 11 U. S. C. A., Section 11(5), nor as "conducting any business" within the meaning of Section 124a of Title 28, U. S. C. A., and any status such trustee may have been given by virtue of Section 124a as an "individual" or "corporation" conducting any business, is no longer to be attributed to him.

While the pertinent facts as stated in Appellant's opening brief are in the main correct, most of such facts having been stipulated to at the hearing before the Referee, we believe that a separation of the sales into the categories given to them by the District Judge is of prime importance to a clear view of the issues involved in this appeal. They are:

The Corporation.

It engaged in the business of making retail sales until the receiver was appointed.

The Receiver.

George Goggin, as receiver, also engaged in the business of making retail sales between February 5, to March 11, 1946, when the corporation was adjudicated a bankrupt. During this time the receiver conducted the business of the bankrupt, in that he renegotiated some contracts which the bankrupt already had on hand, and proceeded to complete the manufacture of articles already contracted for by the bankrupt, these articles being manufactured from materials on hand. [Tr. 91.]

The Trustee in Bankruptcy, After Adjudication.

Under an order of the Bankrupty Court permitting him to conduct the business for a limited time, conducted the business of the bankrupt and was engaged in the business of making retail sales to the extent of completing the building of two or three kitchen cabinets already contratced for from materials on hand, during the period of March 12, to March 22, 1946. [Tr. 95, 96.]

The Trustee in Bankruptcy Under an Order of Court to Liquidate.

He did not conduct the business of the bankrupt, did not conduct any business, and did not engage in the business of making retail sales, after March 22, 1946, when he received the order to sell in liquidation subject to the confirmation of the court which terminated his authority to operate the business. Exhibit A [Tr. 64, 65, 66], the record of his receipts after

March 12, 1946, until the date of May 14, 1946, show that he delivered and received payment for kitchen cabinets contracted for and completed prior to the order to sell in liquidation.

It may be mentioned here that of all of the sales made during the period after the order to sell in liquidation, Appellant complains only that the sales tax was not paid for the privilege of selling the five trucks.

Though Appellant has made the statement at page 2 of its opening brief that the District Judge's decision was predicated upon factual situation not supported by the record, actually, counsel have pointed to no distortion of the facts; Appellant's quarrel is, rather, with the conclusions of law which the lower court has drawn from those facts.

We submit that Appellant has failed to present to this Court the purport of such decision. We respectfully urge that Appellant's opening brief is predicated upon a view of the decision which finds no support therein, and we feel that a correct summary of the points covered in the opinion should be given here.

The District Judge Held:

1. The trustee herein was not subject to the Sales Tax provisions of the California Sales and Use Tax Law, in making the sales of the five trucks involved in the review of the Referee's order.

a. After March 22, 1946, on which date the trustee was ordered to sell the assets of the bankrupt estate either at public auction or private sale, he did not conduct the business of the

bankrupt within the meaning of Section 2(5) of the Bankruptcy Act, 11 U. S. C. A. 11(5); nor did he conduct any business within the meaning of Section 124a of Title 28, U. S. C. A. After March 22, 1946, he was a trustee in bankruptcy, selling the assets of a bankrupt estate, after adjudication, under order of court, in liquidation, and the fact that he had previously conducted the business of the bankrupt had no materiality.

b. The trustee herein was not included in the definition of persons subject to the California Sales and Use Tax Law, Section 6005, Revenue and Taxation Code.

(1) The California Legislature in enacting the Law used no words which expressly included a trustee such as involved herein.

(2) The California Legislature did not intend to include a trustee such as involved herein.

c. A trustee in bankruptcy making sales (at retail) of the assets of a bankrupt estate, after adjudication, under order of court, in liquidation, subject to confirmation of the court, is not "engaged in the business of making retail sales" within the meaning of the Sales Tax provisions of the California Sales and Use Tax Law, Sections 6013 (defining business), 6014 (defining seller), 6015 (defining retailer), as said sections read in 1946.

2. The Referee had jurisdiction to issue the injunction notwithstanding the provisions of Section 41(1) of Title 28, U. S. C. A., now Section 1341 of Title 28 as revised in 1948.

a. The tax, if applicable to the trustee, was an administrative expense to be examined, etc. by the Referee under Section 62a of the Bankruptcy Act, 11 U. S. C. A. 102a.

b. The Referee examined the administrative expense and found it not an administrative expense but an invalid application of the tax.

c. The enforcement of the provisions of the Law would result in an interference with the control of the Bankruptcy Court over property in its custody, and an interference with its jurisdiction in the administration of the bankrupt estate.

d. Payment of the tax under protest and suit for a refund in the State court did not provide a plain, speedy and efficient remedy for the trustee herein.

Before we point out some of the statements in Appellant's opening brief which show a misconception of the conclusions of the District Judge and of the opinion rendered by him, we wish to emphasize what counsel for Appellant seem to have overlooked; the decision was limited in its consideration to *a trustee in bankruptcy who*

made retail sales of the assets of the bankrupt estate, after adjudication, pursuant to the order of the Bankruptcy Court to sell such assets in liquidation subject to the confirmation of the Court, also, the decision of the District Court was based upon the law as it read in 1946 when the liability was alleged to have accrued.

Appellant's Counsel Have Erroneously Set Forth the Purport and Effect of the District Court's Decision.

At page 117 of the Transcript of the Record, in the "Statement of Points Upon Which Appellant Intends to Rely" at Paragraph 7, counsel state:

> "The District Judge erroneously concluded and held that, even if the California Sales and Use Tax Law does purport to apply to a trustee in bankruptcy making sales of tangible personal property in liquidation of a bankrupt estate, the trustee is nevertheless not subject to the California Sales and Use Tax Law by virtue of his status as an officer of the Bankruptcy Court."

Having stated that the District Judge *did* decide that such a trustee would not be liable for the tax, even though the California statute did purport to apply to him, counsel then proceeded, at page 26 of their opening brief, to make another and different interpretation of the decision:

> "The Judge below failed to reach any conclusion as to whether a trustee in bankrupcty solely making numerous liquidation sales at retail would be subject to the provisions of the California Sales and Use Tax Law if that Law clearly purported to apply to such trustee."

We take issue first with the statement last quoted. The District Judge, at page 663 of the opinion, mentioned that the trustee herein, when discharging his statutory duties was not "engaging in business" and was not "conducting any business." It thus follows that even if the definition of "person" in the California statute included the words "trustee in bankruptcy" and the words "making numerous liquidation sales at retail," the trustee herein would still not be liable for the tax unless his acts brought him within the classification of those "persons" who must pay for the privilege of selling at retail, *i.e.,* retailers, *i.e.,* "persons" *engaged in the business* of selling at retail.

Referring to the statement first quoted, that found in the Transcript of Record, we must contradict the assertion that the opinion held the "trustee is nevertheless not subject to the . . . Law by virtue of his status as an officer of the Bankruptcy Court."

Also, we cite as a misconstruction of the opinion, the statement found at page 18 of the Appellant's opening brief:

> "it was held below that trustees in bankruptcy are not included in the definition of persons because they are in effect officers of the United States, and are not to be blithely characterized as 'trustees.'"

We refer to the District Judge's opinion, note 13, page 649, where he found it unnecessary and unimportant to decide whether the trustee here involved should be classed as an instrumentality of the United States. The Court did not indicate at any point, that an "officer of the United States" could not be, "blithely" or otherwise, characterized as one liable for the California sales tax.

In fact, the Court below expressly recognized that Congress had provided, by Section 124a of Title 28, U. S. C. A., that a trustee in bankruptcy who conducted the business should be regarded as of such a nature as to come within the range of the state tax laws as an individual or a corporation. (Opinion p. 662.) He also recognized Congress had not seen fit to say that a trustee such as the one involved herein should be so regarded.

Indeed, no *sanctity* was attributed to the trustee herein because of his status as an officer of the Bankruptcy Court. In fact it was indicated in the opinion, at page 665, that the California Legislature should be able, if it wished to take the trouble, to include within its taxing statute a trustee in bankruptcy such as the Appellee. The lower court hinted, however, that the Legislature might have deemed the problem of avoiding conflict with the Bankruptcy Law too difficult compared to the amount of revenue it would obtain from such a trustee.

The following quotation from page 27 of Appellant's opening brief shows a glaring departure from the conclusions expressed by the lower court:

> "To the contrary, it is apparently concluded that trustees in bankruptcy are not subject to the Law regardless of the nature of their activities and apparently even though they be clearly conducting the business of a bankrupt."

We are astonished that the attorneys who signed the brief could make such a statement. Counsel know that since the beginning of these proceedings the liability of a trustee conducting the business of the bankrupt has been conceded by everyone. Further, the opinion, at page

640, discusses and quotes from cases construing Section 124a of Title 28, U. S. C. A. At page 662 it is noted that Congress could and did, by such section, fix upon a trustee in bankruptcy conducting the business of the bankrupt the "nature" of a private person or corporation for the purpose of such tax liability.

The Findings Are Supported by the Record.

Appellant argues that the District Court should have interpreted the stipulation heretofore referred to in the same light attempted by Appellant and that in effect the judge should have been bound by same. We respectfully contend that even though the stipulation had included the words "while conducting the business" (which it did not), the evidence proved directly to the contrary, and the Court would not have been bound by such stipulation.

> *Farmers and Merchants Bank of Los Angeles v. Board of Equalization of Los Angeles,* 97 Cal. 318.

It is argued by Appellant that Paragraph VIII of the findings of fact is entirely unsupported by the record because the record discloses that the only action taken by Appellant consisted of making additional determination and demand for the payment thereof. Appellant further argues there is nothing in the record to indicate that any "improper" action against Appellee was ever contemplated. The record fails to disclose that any allegation was made by Appellee that Appellant was threatening or engaging in any "improper actions." We respectfully submit it must be presumed as a matter of law that Appellant after

making demand, and payment not being made, would enforce the provisions of the Law for the payment thereof, but according to Appellant's argument, this Court would have to presume that after demand and non-payment, Appellant would take no further action for collection of said tax. Such failure to enforce the provisions of the statute would be in excess of the power of the Board, which has no authority to make exceptions where the same are not made by statute.

American Distilling Co. v. State Board of Equalization (1942), 55 Cal. App. 2d 799, 131 P. 2d 609;

People v. Universal Film Exchanges, 34 Cal. 2d 646, 213 P. 2d 697;

Crane Co. v. Arizona State Tax Commission (1945), 63 Ariz. 426, 163 P. 2d 656, 662, 163 A. L. R. 261.

We submit that there is sufficient evidence in the record to support the District Judge's finding VIII; further, that if, in the opinion of counsel for the Board there had not been sufficient evidence to support the Referee's finding which was incorporated in the said finding VIII of the District Judge, the Appellant should have made mention of the Referee's error in its Petition for Review. He should not be heard to urge on appeal a matter to which attention was not called prior to the rendition by the District Judge of his opinion herein.

We must call to this Court's attention that it does not appear anywhere in the record herein that prior to the decision of the lower court any indication whatever was made that the Board would not seek, through the en-

forcement provisions of the statute, to compel payment of the tax by the trustee or out of the bankrupt estate. It does not appear prior to such decision, that counsel questioned whether the Bankruptcy Court had obtained jurisdiction over the officers of the State Board of Equalization. It does not appear prior to such decision, that the power of the Referee or the District Judge to issue the injunction was challenged.

Appellant should not be heard to raise these questions for the first time upon appeal, especially in view of the fact that it was indicated that counsel for the Board were seeking to make a "model" case for presentation to a higher court. [Tr. 50, 70.]

The Proceedings Before the Referee Did Not Amount to a Suit Against the State of California Without Its Consent.

It is undisputed that the Appellee applied to Appellant for and obtained a license under the provisions of the California Sales and Use Tax Law, and paid to Appellant certain taxes accruing while conducting the business of the bankrupt, and that Appellant made demand upon the Appellee for further taxes.

The Appellant came into the Bankruptcy Court to license the Trustee and receive funds from the bankrupt estate. How, then, can Appellant contend that the court had no jurisdiction? If this be true, no person dealing with a receiver or trustee in bankruptcy would be subject to the jurisdiction of the Bankruptcy Court, and therefore, could treat the officers of the court in any manner they chose.

All persons dealing with officers of the court in bankruptcy proceedings during the administration of the estates are subject to the jurisdiction of the court.

Thus Section 62a alone or in conjunction with other provisions and principles allows an *affirmative* determination assessing costs of administration to certain interested parties. The more important and eminently protective function of Section 62a, however, is to authorize the *negative* side of the determination; the court may refuse to saddle certain expenses upon the estate, irrespective of, and unconcerned about, who will ultimately bear their burden.

Collier on Bankruptcy, 14th Ed., Vol. 3, p. 1400.

These Proceedings Were Not a Suit Against the State.

Appellant's counsel, at page 11 of their opening brief, make the statement:

> "A state's immunity from suit without consent, either directly or through one of its duly constituted agencies is too well established to warrant discussion."

Citing as their authority for such principle, 49 Am. Jur. at pages 301, 304, and Willoughby on the Constitution of the United States, Vol. 3, 2nd Ed. (1929), commencing at page 1381, and at page 1396.

The general principle stated by counsel is enunciated in each of the texts at the pages cited, but also in each of said texts, a few pages further on we find exceptions which refer to the situation here presented and which cast a vastly different light upon counsels' positive assertion just quoted. At pages 310 and 311 of 49 Am. Jur. and at

page 1412 of Vol. 3 of Willoughby on the Constitution of the United States, it is noted that the acts of officials which are not legally authorized or which exceed or abuse the authority or discretion conferred upon them are not acts of the state and that a suit against such officials is not a suit against the state. Also there is clear authority to the effect that the Eleventh Amendment which denies to the citizen the right to resort to a federal court to compel or restrain state action, does not preclude suit against a wrongdoer merely because he asserts that his acts are within an official authority which the state does not confer.

Worcester County Co. v. Riley, 302 U. S. 292, 297;

Greene v. Louisville & I. R. Co., 244 U. S. 499, 506, 507;

Ex parte Young, 209 U. S. 150, 155.

The Federal Court's Jurisdiction Is Not Defeated by Prohibition of State Statute.

A state cannot, by statute inhibiting injunction to restrain collection of taxes, deprive federal equity courts of jurisdiction in proper cases to restrain such collection.

Skagit County, et al. v. Northern Pac. Ry. Co. (9th Cir., 1932), 61 F. 2d 638, 643.

Such a provision in the California Sales and Use Tax Law prohibiting an injunction could not be binding upon the Bankruptcy Court where it is necessary to prevent the defeat and impairment of its jurisdiction.

Steelman v. All Continent Corporation, 301 U. S. 278, 289, 57 S. Ct. 705, 81 L. Ed. 1085.

Also, the property of the bankrupt estate is in the custody of said court, and under its exclusive control.

Isaacs v. Hobbs Tie & Timber Co., 292 U. S. 734, 737, 738, 51 S. Ct. 270, 75 L. Ed. 645.

A Separate Suit for Injunction to Obtain Jurisdiction Over the Appellant Is Not Necessary.

Appellant complains at page 12 of its opening brief that neither the State of California nor the Board of Equalization was a party to the bankruptcy proceeding involving the West Coast Cabinet Works; that the Referee did not obtain jurisdiction by the service of the order to show cause upon the Board, and that jurisdiction could not have been obtained of the State or the Board without a separate suit being commenced "in the authorized manner."

The tax was an administrative expense.

Heyman v. U. S. (6 Cir., 1923), 285 Fed. 685;

McColgan v. Maier Brewing Co. (9 Cir., 1943), 134 F. 2d 385.

As has been heretofore stated herein, a demand for payment of an administrative expense (the tax in question) was presented to the Trustee, who in turn presented it to the Referee, who disapproved it, and who issued an injunction after a hearing, to prevent the defeat or impairment of his exclusive jurisdiction and to protect the property and assets of the bankrupt estate.

We quote from the case of *In re International Power Securities Corporation* (3 Cir., 1948), 170 F. 2d 309, at page 402:

> "Certain well established principles are applicable in the determination of the question as to jurisdiction.
>
> "They are: Courts of bankruptcy are invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings. *Local Loan Co. v. Hunt,* 1934, 292 U. S. 234, 240. They are empowered to issue an injunction in a summary proceeding when necessary to prevent the defeat or impairment of their exclusive jurisdiction or to protect the property and assets of a bankrupt wherever situated. (Citing in a note Section 111 of the Bankruptcy Act, 11 U. S. C. A. 511.) The power of a bankruptcy court to protect by injunction the subject matter of its jurisdiction is inherent in the court as a virtual court of equity and exists as well by virtue of Section 2, sub. a (15) of the Bankruptcy Act, 11 U. S. C. A., Section 11, sub. a (15), and the 'all writs' provision of Section 262 of the Judicial Code, 28 U. S. C. A., Section 377. (Revised Judicial Code, Title 28 U. S. C. A. 1651.)"

A Plenary Proceeding Was Not Necessary.

We do not believe it may be said that a separate proceeding, a plenary proceeding, was necessary to acquire jurisdiction of the Board of Equalization, but in any event, it is clear that the Board acquiesced in the Referee's jurisdiction over it, and participated in the hearing on the order to show cause, sought a review of the Referee's order, and participated in the proceedings before the District Court, all without raising the question of the juris-

diction of the Bankruptcy Court over Appellant, until after the Referee and the District Judge had decided adversely to Appellant on the merits.

The record indicates that it was understood by all counsel that the hearing before the Referee was the first step toward a decision on the Questions involved by a higher court.

See the Referee's remarks. [Tr. 50.]

That the Board had no objection to the jurisdiction over it of the Referee, and to his determination of the questions involved is also made clear by the following remark of counsel for the Board at the hearing on the order to show cause. [Tr. 70.]

> "May I say this, that if we cannot get our evidence into the record we obviously will have to wait until we can go before another Referee who will permit the introduction of this testimony."

(The testimony mentioned was admitted by stipulation and added by an amended certificate after the Petition for Review was filed).

Expedition in Administration of the Estate Is Required.

To close up the estate "as expeditiously as is compatible with the best interests of the parties in interest" is a duty of the trust required not only by clause (1) of Section 47a, but also by implication from other provisions found in the Act and the General Orders. A trustee who unduly delays settlement of the estate has been held not entitled to interest on advances made to pay expenses of administration; and where such delay is due to the in-

efficiency of the trustee, he should be removed from office. If a loss results because of the neglect of the trust to act expeditiously, he may also be surcharged with the amount of such loss.

In *Rife v. Ruble,* 41 A. B. R. (N. S.) 543, 107 F. 2d 84, the court said:

> "While a bankruptcy trustee is undoubtedly charged with the duty of preserving property which comes into his custody, including that of claimants whose claims he may in the exercise of a reasonable judgment oppose, yet he is also charged with the duty of expeditiously liquidating the estate and avoiding all unreasonable expense either in its preservation or distribution."
>
> Collier on Bankruptcy, 14th Ed., Vol. 2, p. 1745.

The State Law Did Not Afford the Trustee Herein a Plain, Speedy and Efficient Remedy.

The cases cited by Appellant at page 14 of its opening brief, *Nevada-California Electric Corp. v. Corbett,* 22 Fed. Supp. 951, and *Corbett v. Printers and Publishers Corp., Ltd.,* 127 F. 2d 195, are not decisive as to whether the trustee involved herein had a plain, speedy and efficient remedy at law for the reason that those cases involved corporations. In order for the trustee to have brought suit for refund he must have followed the steps prescribed by the Law to precede the bringing of his action, and beforehand must have paid the tax out of funds which constituted assets of the bankrupt estate under the exclusive control of the Bankruptcy Court.

With reference to Appellant's argument that Appellee has a speedy and adequate remedy under the state law, it

might better be said that Appellee has a *remedy only,* because a careful analysis of the provisions of the law pertaining to refunds will demonstrate that the remedy is neither *speedy* nor *adequate.*

The California Sales and Use Tax Law provides as follows:

> "Section 6932. Claim for refund or credit as condition precedent. No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed pursuant to Article 1 of this chapter."
>
> "Section 6561. Right to petition for: Time to file petition. Any person against whom a determination is made under Articles 2 or 3 of this chapter or any person directly interested may petition for a redetermination within 30 days after service upon the person of notice thereof. If a petition for redetermination is not filed within the 30-day period, the determination becomes final at the expiration of the period."
>
> "Section 6902. Claim for refund: Necessity for: Time to file. No refund shall be allowed unless a claim therefor is filed with the board within three years from the fifteenth day after the close of the quarterly period for which the overpayment was made, or, with respect to determinations made under Articles 2 or 3 of Chapter 5 of this part, within six months after the determinations become final, or within 60 days from the date of overpayment, whichever period expires the later. No credit shall be allowed after the expiration of the period specified

for filing claims for refund unless a claim for credit is filed with the board within such period."

"Section 6933. Time to sue: Venue of action: Effect of delay. Within 90 days after the mailing of the notice of the board's action upon a claim filed pursuant to Article 1 of this chapter, the claimant may bring an action against the board on the grounds set forth in the claim in a court of competent jurisdiction in the County of Sacramento for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

"Failure to bring action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments."

Note: Appellant refers to the 1947 Amendment to the last section, which permits suits in counties of Sacramento, San Francisco and Los Angeles. This amendment was not in effect at the time of the trial.

Even under the 1947 amendment, trustees and receivers operating in the State of California (and there are many outside of the three counties) would have to travel to one of these points to try their suit against the Board of Equalization. A trial might involve an appeal, a petition for rehearing, a petition for hearing in the Supreme Court, which could conceivably project itself into years of litigation. We respectfully contend that the only adequate and speedy remedy available to receivers and trustees is the summary jurisdiction of the Bankruptcy Court in determining the legal liability for the taxes imposed.

A Three Judge Court Was Not Required.

The petition for order to show cause filed by the trustee which initiated the proceedings prior to this appeal did not raise a constitutional issue; no finding or conclusion concerning the constitutionality of the statute involved was made by the Referee; the petition for review filed by the Board made no mention of a constitutional question, and the District Court in its Opinion, Findings of Fact and Conclusions of Law did not consider the constitutionality of the state law involved.

With Reference to Part II of Appellant's Opening Brief.

Pages 21 to 49, inclusive, of Appellant's Opening Brief, are devoted exclusively to a page by page criticism of the opinion below. The only practical way to demonstrate the fallacy of counsel's criticism is to refer to the opinion itself, and it would do little good for us to set forth at length here what the opinion states. Suffice to say that if the opinion is studied in conjunction with the notes appended thereto, counsel's argument is more accurately answered than with any language that we could employ.

By way of example, on page 37 of Appellant's Opening Brief, the statement is made that the opinion concludes "that the California Sales Tax cannot constitutionally be imposed upon trustees in bankruptcy in connection with liquidation sales made by them." Commencing on page 653 of the reported opinion it is observed:

> "It is not our thought that for the purpose of a decision on the matter before us we are required to pass upon the constitutionality of the California law under consideration as applied to the trustee before us; . . ."

Again on page 47 of Appellant's Opening Brief it is stated:

> ". . . Erroneously assumed, again, is the proposition that compliance with the California Sales and Use Tax Law by appellee would have resulted in interference with the bankruptcy court's control over appellee's activities and the property in its custody."

Starting at page 656 of the opinion, a complete discussion is had of all of the provisions of the Law which would constitute interference with the orderly and expeditious administration of the estate. Among these provisions are those such as obtaining a permit, for which the Board, may, if it sees fit require that security be deposited. Should this amount be fixed in an amount greater than the estate can furnish, or should the estate have no cash assets and no security which could be deposited, a permit could not be issued, and the trustee would, on peril of being imprisoned for a violation of the act, sell the assets, or refrain from selling such assets and violate the plain mandate of the Bankruptcy Act to dispose of the assets as expeditiously as possible. Too, if at any time the Board is not "satisfied" that the retailer will pay the tax when due, it may demand additional security; should the Board believe the retailer will not pay the tax after a deficiency is shown, it may "freeze" the security, thus interfering with the control of the assets by the Bankruptcy Court, and delaying the administration of the estate. Further provisions make it mandatory that the trustee file returns quarterly or at more frequent periods if decreed by the Board; the provision for quarterly payment, or for payment at more frequent intervals would result in the State being paid in full at the expense of

other administration creditors whose claims may not yet have accrued, such as the trustee, the attorneys for the bankrupt, and perhaps others who have assisted in conserving the estate. The provisions above enumerated do not constitute the total of those mentioned in the opinion as serving to withdraw from the Bankruptcy Court the control of the bankruptcy estate, but are sufficient to negative the premise on which the Appellant bases his contradiction of the conclusion of the opinion in this regard.

JUDICIAL SALES.

In the court below, Appellee earnestly contended that judicial sales in any event could not be subject to the provisions of the California Sales and Use Tax Law, and although the lower court decided the issue on the theory of the line of cleavage between conducting the business and liquidating, and upon the further theory that the trustee when liquidating was not engaged in business and was not included in the definition of the statute defining "persons," it is respectfully contended that during any liquidation in bankruptcy all sales are *judicial sales.*

Sales in bankruptcy other than in the course of operating the business are *judicial* sales. In judicial sales the court is the real seller and the trustee but its agent to obtain the highest bid; the trustee cannot pass title and no title is vested in the purchaser until an order confirming the sale is made by the court.

American Bottle Company v. Finney, 203 Ala. 92, 82 So. 106, 43 A. B. R. 685;

Robertson v. Howard, 229 U. S. 254, 57 L. Ed. 1174, 38 S. Ct. 854, 30 A. B. R. 611;

In re Burr Mfg. Company, 217 Fed. 16, 32 A. B. R. 708 (C. C. A. N. Y.);

Moccasin State Bank v. Waldron, 81 Mont. 579, 12 A. B. R. (N. S.) 1;

In re D. T. Bohan Co., 22 Fed. Supp. 561, 34 A. B. R. (N. S.) 105 (D. C. Ky.);

Stang v. Hadden, 26 Fed. 11;

In re Glas-Shipt Dairy Company, 239 Fed. 122, 38 A. B. R. 554 (C. C. A. Ill.);

In re Virgin, 16 A. B. R. (N. S.) 314 (Ref. Pa.);

In re United Toledo, 152 F. 2d 210, 1945 (C. C. A. 6, Ohio);

In re Wolke Lead Batteries Co., 294 Fed. 509, 2 A. B. R. (N. S.) 630 (C. C. A. Ky.): "While the highest bidder for property offered for sale by a Trustee in bankruptcy is entitled to have his bid accepted by the Trustee and reported for confirmation (*In re Williams,* 197 Fed. 1, 28 A. B. R. 258), yet he is not the purchaser and is not vested thereby with even an equitable title in the property until the sale is confirmed."

By the act of confirmation, the sale becomes complete and the title passes.

In re Finks, 224 Fed. 92, 34 A. B. R. 749 (C. C. A. Ohio).

And it is just as much a judicial sale where the court simply approves an offer made, as where it first orders a sale and thereafter approves an offer.

> *In re Jungmann,* 186 Fed. 303, 26 A. B. R. 401 (C. C. A. N. Y.);
>
> *In re Harvey,* 122 Fed. 745, 10 A. B. R. 567, 568 (D. C. Pa.).

We are not herein concerned with judicial sales in the broad sense, but rather judicial sales conducted by receivers and trustees in *bankruptcy.* These sales must be interpreted and governed by the decisions of the Federal Courts and the Federal Courts are not concerned in this instance with an interpretation of a State Court in construing a statute applicable to a citizen of that state in a State Court proceeding, or a transaction involving state officials and private individuals.

There is nothing in the law which permits or suggests the licensing of an agent of a Retailer, and the Trustee being the agent of the court could not be licensed in selling tangible personal property in judicial sales.

The California Sales and Use Tax Law contains the following provisions:

Section 6051:

> "For the privilege of selling tangible personal property at retail a tax is imposed upon all retailers . . ."

Section 6015—"Retailers" includes:

> "(a) Every person engaged in the business of making sales at retail or in the business of making retail sales at auction of tangible personal property owned by the person or others.

"(b) Every person engaged in the business of making sales for storage, use, or other consumption or in the business of making sales at auction of tangible personal property owned by the person or others for storage, use, or other consumption.

"(c) Any person conducting a race meeting under the provisions of Chapter 769, Statutes of 1933, as amended, with respect to horses which are claimed during such meeting . . ."

Section 6066:

"Every person desiring to engage in or conduct business as a seller within this State shall file with the board an application for a permit for each said place of business . . ."

Section 6068:

"After compliance with Sections 6066, 6067, and 6071, by the applicant, the board shall grant and issue to each applicant a separate permit for each place of business within the state . . ."

Section 6071:

"A person who engages in business as a seller in this state without a permit or permits, or after a permit has been suspended, and an officer of any incorporation which so engages in business, is guilty of a misdemeanor . . ."

If it were held that a receiver or trustee in bankruptcy selling tangible personal property at judicial sales is required to procure a license in accordance with the above provisions and failed so to do, how would the State Agency enforce the penal provisions of the Law? Most

assuredly not against the court, and the law does not denounce the act of any person for failure to comply with the law except a person engaged in business as a seller. (Sec. 6071.)

For the foregoing reasons, the order below should be sustained.

Respectfully submitted,

LESLIE S. BOWDEN,

Attorney for George T. Goggin, Trustee in Bankruptcy of the Estate of West Coast Cabinet Works, Inc., Appellee.